

Housing and Justice in Wales

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Housing and Justice in Wales

The Commission on Justice in Wales concluded that Welsh people are being let down by the England and Wales justice system.¹ It found that the ‘jagged edged’² reservation of courts, probation, prisons, etc alongside devolution of social justice responsibilities does not meet people’s needs in Wales. The Commission recommended legislative and executive devolution of responsibility for justice, accompanied by the transfer of financial resources.³ It also recommended that the law applicable in Wales should be formally identified as the law of Wales, distinct from the law of England.⁴

Alongside the Justice Commission, our Nuffield Foundation funded research focused on administrative justice in Wales, including studying administrative law and dispute resolution in social housing and homelessness.⁵ Administrative justice concerns how bodies providing public services treat people, the correctness of their decisions, the fairness of their procedures and the opportunities people have to question and challenge decisions made about them.

Here we present some conclusions and recommendations of our research concerning housing, and how these align with those of the Justice Commission.

The Commission on Justice in Wales

The Commission acknowledged a range of issues that have impacted on accessing justice in the Welsh housing sector, including the scarcity of legally aided advice, assistance and representation (a decline more marked in Wales than in England) and the closure of magistrates and county courts with distinct impacts on rural populations.

The Commission acknowledged that when in force the Renting Homes (Wales) Act 2016 (‘Renting Homes’) will be the first Senedd Act resulting in significant divergence from the substantive civil law of England. It also considered the long delay in implementing Renting Homes to be an adverse impact caused by lack of clear and accountable leadership on justice in Wales. Evidence sessions in the Senedd, and the First Report of the Independent Expert Advisory Committee for ongoing review of the operation of justice in Wales, concur that delayed implementation of Renting Homes has been partially due to developing HMCTS computer systems (specifically the online possession claims portal) to accommodate divergence from English law.⁶ The Expert Advisory Committee also noted that development of systems is costly and time-consuming and will need to be considered whenever Welsh legislation requires changes in the way HMCTS operates.

The Commission noted that the jurisdictional division between the courts and the devolved Residential Property Tribunal for Wales (RPTW) is complex. The RPTW’s jurisdiction has expanded, with new types of claim under the Housing (Wales) Act 2014 and the Mobile Homes (Wales) Act 2013. However, Welsh Government rejected a recommendation from the Senedd

¹ Commission on Justice in Wales, *Justice in Wales for the People of Wales* (November 2019).

² R Jones and R Wyn Jones, *Justice at the ‘Jagged Edge’ in Wales* (Wales Governance Centre 2019).

³ Justice Commission, recommendations 58, 59 and 60.

⁴ Justice Commission, recommendation 73.

⁵ S Nason, A Sherlock, H Pritchard and H Taylor, *Public Administration and a Just Wales and Public Administration and Justice in Wales: Social Housing and Homelessness* online at:

<https://www.nuffieldfoundation.org/project/paths-to-administrative-justice-in-wales>

⁶ *Justice in Wales: First Report of the Independent Advisory Committee on Justice in Wales* (July 2019) para 50.

Equality, Local Government and Communities Committee that more significant use should be made of the RPTW. The Commission remarked: ‘There has been a tendency in the legislation passed by the Assembly for it to specify that dispute resolution should take place in the County Court or in the non-devolved courts and tribunals. We regard this as anomalous when specialist Welsh tribunals exist that have the competence and capability to determine disputes.’⁷ The Commission also noted that whilst ‘housing law is fully devolved to Wales, neither the Welsh Government nor the Assembly has, to date, considered trying to consolidate the jurisdiction for housing disputes into one court or tribunal’.⁸ It subsequently recommended: ‘Welsh tribunals should be used for dispute resolution relating to future Welsh legislation’.

Administrative justice in Wales

The Justice Commission recognised that: ‘Administrative justice is the part of the justice system most likely to impact upon the lives of people in Wales’.⁹ It also noted that: ‘Whatever the current state of divergence [between Welsh and English law], it seems safe to conclude that it is in the field of substantive administrative law that the scope for divergence has the most potential in the short term’.¹⁰ Administrative law is the law which imposes duties on public bodies, or which imposes duties of a public character on private bodies, this then includes sections of the Housing (Wales) Act 2014, and of Renting Homes. But there are also wider general administrative law duties placed on local authorities in Wales that impact on their development and provision of social housing, and their delivery of homelessness related services. These include the Well-being of Future Generations (Wales) Act 2015, and the Welsh Language (Wales) Measure 2011.

Our research mapped problems faced by individuals in their interactions with local authorities and Registered Social Landlord (RSLs). In our Report, we examine the different legal treatment of local authorities and RSLs in Wales, and speculate on whether aspects of the legal frameworks applying to each could be brought more closely into line, especially in the context of Renting Homes (which levels the playing field between different types of organisations). We support consideration of a ‘domain based’ approach to social housing regulation, and recommend that work to clarify, consolidate and codify Welsh law examines the different well-being, human rights and equality-based duties that apply to local authorities and RSLs and consider the case for rationalisation and/or harmonisation.

Early decision-making, information, advice and assistance

Our research also examined the experiences of administrative decision-makers in local authorities and RSLs. We found that partnership working had been encouraged, and we identified effective examples across local authorities. Research participants noted that partnership working requires a joined-up person-centred approach to providing housing and other public services, and that routes to resolving complaints and/or disputes arising should also reflect this. However, they also acknowledged that partnership working makes it difficult for individuals (and advisers) to know who is responsible for making decisions in their case, what law applies, and where routes to accountability lie. This exacerbates problems already caused by the application of different legal regimes to local authorities and RSLs, and by the fragmentation of law across devolved and non-devolved sources. We came across examples

⁷ Justice Commission, para 6.59.2.

⁸ Justice Commission, para 5.35.

⁹ Justice Commission, para 6.1.

¹⁰ Justice Commission, para 6.15.

where English law had been incorrectly applied in place of devolved Welsh law; including in responses to our surveys, in our workshops, in case documents on the days we observed county court hearings, and in examples from the Public Services Ombudsman for Wales (PSOW) Casebook.

The provision of early advice on homelessness has likely increased following the Housing (Wales) Act 2014, and local authorities are working more closely with advisers, such as Shelter Cymru and Llamau. However, some of our participants noted that advisers working out of local authority premises can lead to concerns over whether advisers are properly perceived as independent and impartial, and this need to be carefully managed.

Our participants stressed that even when legal rights to seek review or appeal of housing decisions are stated clearly in a decision letter, lack of access to advice is still a major barrier to accessing and navigating routes to redress. The landscape for accessing legally aided advice is complex; public funding is available to challenge some aspects of decision-making (county court appeals and some judicial reviews) but not to challenge other aspects (advice on challenging social housing allocation decisions - unless this involves judicial review).

Local authorities and RSLs in Wales try to encourage early and informal dispute resolution, and this is the most prevalent form of dispute resolution activity in the sector. However, we found that information about the number of people using informal dispute resolution procedures and their outcomes is not routinely kept.

Redress procedures in social housing and homelessness

Key mechanisms in administrative law housing dispute resolution in Wales are internal administrative review, county court claims and judicial review. Across homelessness, social housing allocations and social housing tenancy decisions, we found that the incidence and outcomes of administrative reviews vary across local authorities, and that for most authorities administrative reviews are rare in the context of social housing tenancy decisions, with slightly more relating to social housing allocation. Many local authorities do not record how many reviews are requested and their outcomes. Shelter Cymru research found better record keeping for homelessness administrative reviews, but that processes and outcomes are still variable.¹¹

Turning to the courts, only three ‘housing’ judicial reviews were issued against Welsh public body defendants in the Cardiff Administrative Court from April 2009 to May 2018; none of the claimants were legally represented and the claims didn’t proceed to a final substantive hearing. There were less than 20 homelessness judicial review applications over the same period, and most were prior to the Housing (Wales) Act 2014 coming into force; almost all involved Shelter Cymru. From our Freedom of Information Act requests, none of the 12 local authorities who responded had been subject to an issued judicial review on any aspect of housing or homelessness in their last two reporting periods, and those who kept records of pre-issue contacts had also not received any Letters Before Claim. However, we heard, and Shelter Cymru has reported, examples of local authorities re-taking decisions under threat of judicial review (but not conceding the legal issues raised) because the authority cannot afford to defend a claim in court. The lack of independent, transparent, judicial attention to Welsh housing law (and broader Welsh administrative law) is a cause for concern; as Shelter Cymru note,

¹¹ Shelter Cymru, *Implementing the Housing (Wales) Act 2014: the role of homelessness reviews and litigation* (June 2020).

‘litigation is normal and necessary for the development of good law and to promote consistency in its interpretation.’¹²

We examined administrative justice issues raised by Renting Homes and recommend that these should be monitored when it comes into force. These issues include; reliance on internal administrative review as a first means of redress, and on appeals and a new form of county court legality review as the second stage; codification of reasonableness (whether a possession notice is reasonable) that has the potential to clarify the law but could also limit development and lead to technical legal disputes; and the landlord’s power to temporarily exclude a contract-holder from the dwelling for 48 hours (with no right to redress other than the back stop of judicial review – potentially breaching Article 6 ECHR according to some legal experts responding to our research).

The future of housing dispute resolution in Wales

The Justice Commission highlighted that Welsh Government is yet to consider how housing disputes should be resolved in Wales. We conclude that whilst studies have been conducted ostensibly on an England and Wales basis, due to timing, scope or objectives, none has been able to fully consider the current situation of housing law and dispute resolution applicable to Wales, or the inter-action between devolved and non-devolved law and redress. This means that some proposals either do not apply to Wales, or their application is problematic.

When examining Renting Homes, the Senedd Equality, Local Government and Communities Committee considered making greater use of the RPTW. Some issues examined were: current awareness and use of the RPTW (including that some tenancy agreements specifically exclude its jurisdiction); the RPTW’s resources and capacity; RPTW expertise, procedures, and access to advice and representation including legally aided representation (as compared to in the county courts); inter-play between types of case, including appeals and reviews, and cross-jurisdictional complexity including the complexity of routes to appeal.

The discussion around greater use of the RPTW is indicative of issues disclosed by proposals to rationalise housing dispute resolution in England and Wales, including by establishing a single housing court, currently being considered by the UK Ministry of Housing, Communities and Local Government. The single court would combine the housing dispute resolution jurisdictions of the county courts (in England and Wales) and the First-tier Tribunal Property Chamber (England, and in some cases England and Wales), but not (it would appear) the jurisdiction of the RPTW. The RPTW could potentially be absorbed into an England and Wales housing court, and such ‘reverse devolution’ was proposed by the Law Commission in a 2007 consultation on Proportionate Dispute Resolution in housing.¹³ However, it is unlikely this would occur now given the political context and divergence between English and Welsh housing law.

Short of proposing a single housing court, other pilot initiatives include flexible co-ordination and/or ‘cross-ticketing’ of judges so that housing disputes with elements that are fragmented across the county courts and relevant tribunals, can be addressed by a single judge, in a single hearing, sitting simultaneously as a court and tribunal judge.¹⁴ Judges of the devolved Welsh

¹² (n 11, p.20).

¹³ Law Commission, *Housing: Proportionate Dispute Resolution* (Law Com No.309, 2008).

¹⁴ <https://www.gov.uk/government/consultations/considering-the-case-for-a-housing-court-call-for-evidence> para 31.

tribunals have already been cross-deployed into other tribunals, and court to tribunal cross-deployment in Wales could, we argue, also be effective, with identification of appropriately specialised and experienced judges. However, the matter of case-management functions would have to be addressed, including whether the devolved Welsh tribunals will be adopting the ‘Core Case Data’ system, a digital system likely to be rolled out across HMCTS courts and tribunals.

Recently a JUSTICE Working Party proposed a new Housing Disputes Service (HDS) as a holistic model of dispute resolution designed to be investigative and multi-disciplinary, specialist and quality, fostering ongoing relationships, assisting and protecting participants, making use of digital approaches and data for learning, and functioning non-adversarially.¹⁵ The HDS would adopt a problem-solving mentality, which the Justice Commission recommended for Wales, and could foster the ‘Five Ways of Working’ under the Well-being of Future Generations (Wales) Act 2015.¹⁶ The JUSTICE Working party considers that legal advisers will still be crucial to the system, working alongside (and within) the HDS at *sustainable rates*.

Housing Law Practitioners Association (HLPAs) members of the Working Party dissented. Their concerns included the adequacy of the JUSTICE Report’s methodology and extent of engagement with stakeholders, as well as questioning whether HDS could be properly funded. HLPAs were also concerned about proposed HDS procedures and the decision-making powers of its officials over clustered issues (such as benefits). They also argued that replacing the most commonly used tiers of the court and tribunal system with what they referred to as a means of ‘relationship management’ rather than a determination of legal rights, could breach Article 6 ECHR (even though appeal to a higher court or tribunal from HDS is intended to be available as of right). HLPAs were also concerned about the extent of compulsion to use ADR.

We consider there are areas of agreement between the JUSTICE Working Party majority and the HLPAs members. First, that current problems are significantly due to under-funding of legal aid and of the county courts. The England and Wales Law Society has been sceptical of creating a single housing court, for similar reasons (that current problems stem from under-funding and from the time taken comply with legal procedures that are *necessarily* required to protect individuals in disputes about their homes). Second, that judges and lawyers already engage in trying to maintain relationships between parties to a dispute and adopt inquisitorial methods (as we found in Wales through observing court proceedings). Third, that cross-ticketing and/or cross-deployment of judges could ameliorate some of the fragmentation in the current system. Fourth, that housing law is complex, but many housing disputes are not, (adding evidence to the case for consolidation and codification of Welsh housing law).

JUSTICE does not specifically address Wales, it proposes ‘a national service with local offices’,¹⁷ and ‘national’ appears intended to mean ‘England and Wales’. JUSTICE proposes that the HDS takes on disputes that currently reside in the First-tier Tribunal (Property Chamber), the county courts and the magistrates’ courts. We question then: would it be the case that a Welsh *regional* HDS should include the jurisdiction (past and future) of the RPTW, or should there eventually be a completely separate *HDS Wales*?

¹⁵ JUSTICE, *Solving Housing Disputes* (March 2020).

¹⁶ These are: thinking long-term, prevention, integration, collaboration and involvement.

¹⁷ *Solving Housing Disputes* (n 15, para 2.20).

A HDS Wales could unify the RPTW with the jurisdiction of the county courts and magistrates' courts in Wales in relation to housing issues, including new types of claim under Renting Homes. HDS Wales could also subsume the current jurisdiction of the First-tier Tribunal (Property Chamber) over disputes from parties based in Wales. HDS Wales might also be tasked to undertake homelessness administrative reviews under the Housing (Wales) Act 2014. JUSTICE recommended that internal reviews in England be externalised to the HDS, and HLPAs agreed that these reviews should be removed from local authorities and be conducted by an independent body.

This proposition raises devolution considerations. Administration of the county courts and magistrates' courts is not currently devolved, nor is the jurisdiction of the First-tier Tribunal (Property Chamber) relating to Welsh cases. A Welsh HDS as a *regional* branch of the England and Wales HDS may be unacceptable as effectively requiring 'reverse devolution' of the jurisdiction of the RPTW. On the other hand, a standalone HDS Wales would require devolution of responsibility for aspects of dispute resolution currently conducted by reserved bodies and would have to be funded by Welsh Government. There is also the matter of how 'cross-border' disputes would be addressed.

Whether or not the HDS is eventually piloted, other reforms proposed by UK Government will have distinct impacts in Wales, making it necessary to decide whether Wales continues to align its approach to housing disputes with that of England, despite differences in policy, regulation and substantive law.

A rights-based approach to housing?

One area of policy difference with England is Welsh Government's intention to promote progressive realisation of a right to adequate housing. In June 2019 Tai Pawb, CIH Cymru and Shelter Cymru launched a report outlining the impact that incorporating a right to adequate housing could have in Wales. This recommended Welsh Government enshrine the right through a dual approach allowing for a 'strong proactive framework for policy making and strong enforcement if the right to housing is breached.'¹⁸ The current Welsh Government approach would not, however, give individuals either a directly or indirectly enforceable legal right, but would encompass promotive and/or procedural duties on local authorities (but not RSLs). Whilst our research participants recognised the potential value of a right to adequate housing, even if only as a means to establish a framework for policy, many were concerned that it could lead to unrealistic expectations on social housing providers, and that to have practical impact it must be coupled with increased social housing stock.

Concluding reflections

A finding of our broader administrative justice research is that aspirations towards rights, equality and good administration in Wales must be more explicitly recognised as matters of justice, and that administrative justice redress mechanisms can bridge the gap between policy and implementation, ensuring that policy makers and decision takers are held to account. This should be coupled with facilitating opportunities for judicial interpretation of Welsh law, but not at the expense of less formal structures of collective justice that have developed from a grass roots level.

¹⁸ Dr Simon Hoffman (Swansea University) for Tai Pawb, the Chartered Institute of Housing Cymru and Shelter Cymru, *The Right to Adequate Housing in Wales: Feasibility Report* (June 2019): <https://www.taipawb.org/wp-content/uploads/2019/06/RightToHousing-ExecSummary-ENG.pdf>

